ROBERT L. AGACINSKI
GRIEVANCE ADMINISTRATOR

ROBERT E. EDICK
DEPUTY ADMINISTRATOR

CYNTHIA C. BULLINGTON
ASSISTANT DEPUTY ADMINISTRATOR

STATE OF MICHIGAN

ATTORNEY GRIEVANCE COMMISSION

ASSOCIATE COUNSEL
WENDY A. NEELEY
RUTHANN STEVENS
STEPHEN P. VELLA
PATRICK K. McGLINN
FRANCES A. ROSINSKI
EMILY A. DOWNEY
KIMBERLY L. UHURU
NANCY R. ALBERTS
DINA P. DAJANI
RHONDA SPENCER POZEHL
TODD A. McCONAGHY
JOHN K. BURGESS

MARQUETTE BUILDING
243 WEST CONGRESS, SUITE 256
DETROIT, MICHIGAN 48226-3259
TELEPHONE (313) 961-6585
FAX (313) 961-5819
WWW.AGCMI.COM

February 28, 2011

Corbin R. Davis, Clerk
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

Re: ADM 2006-38, Proposed Amendments of Subchapter 9.100 et seq

Dear Mr. Davis:

The Attorney Grievance Commission (AGC) has submitted comments previously which were published with the proposed rules. This letter simply serves as general commentary.

There are two underlying principles concerning the disciplinary system which impact consideration of the proposed changes. The first is that the purpose of discipline is to protect the public, the courts, and the legal profession. MCR 9.105. The second is that disciplinary proceedings are to be conducted in as expeditious fashion as possible. See generally MCR 9.102(A) and MCR 9.111(B)(1).

The State Bar proposes to delete MCR 9.104(A)(1)-(3) and (5). Such conduct will cause a direct, substantive change to case law of the disciplinary system. For example, in *Grievance Adm'r v Deutch*, 455 Mich 455 Mich 149, 166 (1997), where the Court held that MCR 9.104(A)(5) and MRPC 8.4(b) have: "different scopes and intents. MCR 9.104(5) specifically targets transgressions of the criminal law, while MRPC 8.4(b) focuses on conduct that reflects adversely on a person's honesty, trustworthiness, or fitness as an attorney, including but not limited to violations of the criminal law. The blanket prohibition of criminal conduct protects the professional from the appearance of impropriety and hypocrisy, while also attempting to protect the judicial system and the public by ferreting out undeserving officers of the court…While the two prohibitions are not mutually exclusive, they are distinct and target different conduct."

The AGC seeks to include additional violations under MCR 9.104(A) (10) and MCR 9.104(B). The goal of the first proposed change is to prohibit attempts by lawyers to hide

misconduct through settlement agreements. The State Bar argues against the necessity of this rule and, if adopted, states that it should be set forth under the Michigan Rules of Professional Conduct (MRPC). It is a distinction without a difference. Formal complaints are filed against respondents for violations beyond those listed in MCR 9.104 and the MRPC. For example, and without limitation, violations of the discovery rules have been charged, as well as criminal violations. Further, both the court rules and the ethics rules are essentially orders generated by this Court and attorneys are required to be aware of the rules under which they operate.

The proposed change to MCR 9.104(B) would allow prosecutions on the grounds of lack of fitness of an attorney as demonstrated by his or her past disciplinary history. A disciplinary proceeding is a re-examination of whether the subject attorney is currently fit to be entrusted with the practice of law and to represent the public in matters of trust and confidence. The proposed new subrule would not suffer the flaw of being subjective but instead, would focus on behavior and whether that person can be entrusted with the practice of law.

The AGC has requested that additional medical information be provided in the new rule proposed under MCR 9.112(E) and the proposed changes to MCR 9.121. These changes are requested to enable the AGC to better evaluate the individual respondent attorney. The AGC is often faced with attorneys who have substance dependency issues, mental health issues, or are incapacitated from practice for reasons of physical incapacity or mental health issues. Frequently, the respondent attorney is offered the opportunity to participate in a confidential diversion program titled "Contractual Probation" under MCR 9.114(B), which avoids public proceedings. Currently, there are approximately 90 individuals who participate in this confidential diversion program. MCR 9.121 addresses transfers to inactive status or requests for placement on public probation. In the latter instance, to qualify for probation, there must be a showing that the attorney's ability to practice law competently was affected by the disability. Again, the additional information is needed due to the inadequacies of both of the current rules.

Under MCR 9.115(F)(4), the State Bar seeks to open up disciplinary proceedings to full discovery. Although the State Bar has termed its proposal "modest," its collateral consequences are not. Chief among the collateral consequence will be the need to expand the staff and perhaps office space of the AGC to accommodate increased staff. The AGC staff has already taken on additional duties. The Court has assigned the AGC with oversight of the *pro hac vice* rule and TAON (the trust account overdraft notification rule – MRPC 1.15A). In a four-month period, 271 overdraft notices have been received which, if the current pace continues, will amount to 813 per annum.

The Court has set a goal to have disciplinary proceedings concluded in 90 days under MCR 9.111(B)(1), but that goal is largely ignored because of current pretrial discovery issues. It is no longer unusual to see interlocutory appeals to the Supreme Court in disciplinary cases; in some instances, two or more such appeals have been taken. Moreover, hearing panelists are voluntary and consumption of their limited volunteer time with unnecessary discovery battles will ultimately harm the quality of justice of a disciplinary proceeding. Disciplinary hearings would mimic civil discovery battles which is inappropriate for a prosecutorial type of system.

Further, such discovery is not necessary. Pursuant to MCR 9.115(F)(4), the Commission already discloses all written statements of a witness, provides witness lists, and produces copies of all documents to be offered into the record upon a demand being filed. The State Bar claims that the administrator is not required to produce exculpatory information but it is in error. Over 13 years ago, the administrator acknowledged that he must produce exculpatory information. See *Grievance Adm'r v Attorney Discipline Board*, 444 Mich 1219 (Sup. Ct. Order 2/18/94); *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed2d 215 (1963). Since then, the administrator has complied with the production of exculpatory material. Most recently, disclosures were made by the administrator in the City of Detroit cases of testimony by an attorney that was considered possibly perjurious.

The State Bar's proposes that in response to "reasonable requests" non-privileged information must be provided. This phrase is unduly vague because it does not set forth any requirement that it be connected to the pending case. Would this require the Commission to provide information about its internal policies? Case load? Why a decision was made to prosecute? The proposal is vague and invasive. The State Bar's "modest" proposal would also require the production of "other material" upon a showing of good cause. It is this latter phrase which will make a mini discovery battle of each prosecution where an investigator's notes will be sought. The proposal does not even have the limiting language in civil discovery of MCR 2.302(B)(3). What "other material"? Would it include the Commission's work product which consists of an investigator's notes? The State Bar's rule is not well-drafted, it is not warranted, and it would work harm by causing substantial delay.

Thank you.

Very truly yours,

Cynthia C. Bullington
Assistant Deputy
Michigan Attorney Grievance Commission